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HO YEE ONN & ANOR v. PP

HIGH COURT SABAH & SARAWAK, MIRI
ALWI ABDUL WAHAB JC
[CRIMINAL APPEAL NO: MYY-41S-9-12-2015]
29 APRIL 2016

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CRIMINAL PROCEDURE: *Sentencing – Plea of guilty – Nature and consequences – Whether exact 'nature and consequences' of guilty plea clearly stated and ascertained – Whether requirements under s. 173(b) of Criminal Procedure Code complied with*

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CRIMINAL PROCEDURE: *Appeal – Record of appeal – Notes of proceedings – Adding grounds of sentencing into original notes of proceedings after filing of appeal – Alteration of what had been recorded during trial – Whether Magistrate adopted wrong procedure – Whether original notes of proceedings should be kept intact*

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The appellants were sentenced to ten months' imprisonment by the Magistrate for an offence under s. 348 of the Penal Code for unlawfully confining one Fadlie. Pursuant to s. 305 of the Criminal Procedure Code ('CPC'), the appellants could only appeal against the extent of the legality of their sentence as they had pleaded guilty to the charge. Nevertheless, the

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appellants submitted four grounds in support of their appeal against their conviction which revolved around the nature and consequences of their guilty plea which they alleged were not properly read and explained. They were as follows (i) wrong nature and consequences of the offence read to the appellants; (ii) the Magistrate was misguided by the wrong nature and consequences of the offence; (iii) the Magistrate failed to state or record the

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parameters of her discretion as far as the nature and consequences of the offence were concerned and inform the appellants of the same; and (iv) the Magistrate failed to consider the nature and consequences of the offence as explained to the appellants indicating that fine could be imposed. It was also highlighted that the notes of proceedings in the Magistrate's Court as found

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in the record of appeal and the supplementary record were different in that the supplementary record of appeal contained brief grounds of sentencing which were added after the conclusion of the trial.

Held (setting aside conviction and sentence):

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(1) Although the nature and consequences were read and explained to the appellants, it was not clearly stated and ascertained as to what were the exact 'nature and consequences' of the guilty plea that were understood by the appellants. This omission ran foul of s. 173(b) of the CPC which requires the court to ascertain that the accused understands the nature

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and consequences of his plea and that he intends to admit the offence unequivocally before the plea was recorded. (para 6)

(2) Without explaining in clear terms of what exactly the nature and consequences of the guilty plea, one cannot assume that the court had informed the accused of his right to claim trial and the material facts stated in the charge. Neither could it be presumed that the appellant had been informed that since he had pleaded guilty to the charge, there would be no trial and that he would be convicted of the charge preferred against him and sentence to be meted out accordingly. All the above must be properly recorded in the notes of proceedings to ensure that the requirements under s. 173(b) of the CPC were complied with. (paras 7 & 8)

(3) It was therefore insufficient for the Magistrate to record in the notes of proceedings that the appellants understood the nature and consequences without further explaining that since they pleaded guilty, they were not entitled to claim trial and to call witnesses but to be convicted upon their own plea and to be sentenced accordingly based on their plea. Thus, in exercising this court's power of revision, this case should be remitted back to the Magistrate's Court for a retrial. (paras 8 & 9)

(4) The notes of proceedings in the record of appeal were the original notes taken by the Magistrate during the trial. However, the notes of proceedings in the supplementary record of appeal was the amended version to include the Magistrate's grounds of sentence in brief. The procedure adopted by the Magistrate was wrong. By adding the grounds of sentencing into the original notes of proceedings, after the filing of this appeal, the Magistrate was basically altering what had been recorded during the trial. This practice should stop immediately unless the alteration was necessary due to minor clerical and editorial mistakes. The original notes of proceedings should be kept intact to ensure that the trial was conducted in a fair and transparent manner. (paras 11 & 12)

Case(s) referred to:
Chai Ai Ping v. PP [2010] 1 LNS 92 HC ***(refd)***
PP v. Kulasingam [1974] 1 LNS 118 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 305
Penal Code, s. 348

For the appellants - Arthur Lee; M/s Arthur CA Lee & Partners
For the respondent - Wan Mohd I'zzat Wan Abdullah, DPP; State AG's Chambers, Sarawak

[Editor's note: Appeal from Magistrate's Court, Miri; Criminal Case No: MYY-84-464-11-2015]

Reported by Suhainah Wahiduddin

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JUDGMENT

Alwi Abdul Wahab JC:

[1] In the present case, both the appellants were sentenced to ten months' imprisonment by the learned Magistrate for an offence under s. 348 of the
B Penal Code for 'unlawfully confined the complainant namely Fadlie bin Mohamad Faizal'.

[2] Pursuant to s. 305 of the Criminal Procedure Code ("CPC"), the appellants could only appeal against the extent of the legality of their sentence as they had pleaded guilty to the charge. Nevertheless, counsel for
C the appellants submitted four grounds in support of the appeal against the appellants' conviction besides the appeal against sentence. In my view and based on the case law, there is nothing to prevent the appellants from contending at the hearing of this appeal that the conviction is illegal and for the court to act in revision which I hereby do (*PP v. Kulasingam* [1974] 1 LNS
D 118; [1974] 2 MLJ 26).

[3] Essentially, what was submitted by the appellants as their grounds of appeal against conviction revolved around the nature and consequences of their guilty plea which they complained were not properly read and explained. They are as follows:

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(a) Wrong nature and consequences of the offence read to the appellants as stated at p. 9 of the appeal record;

(b) The learned Magistrate was misguided by the wrong nature and consequences of the offence as stated at p. 9 of the appeal record;

F (c) The learned Magistrate failed to state or record the parameters of her discretion as far as the nature and consequences of the offence are concerned and inform the appellants of the same; and

(d) The learned Magistrate failed to consider the nature and consequences of the offence as explained to the appellants indicating that fine could
G be imposed.

[4] In the present appeal, it was highlighted to me that the notes of proceedings in the Magistrate's Court as found in the record of appeal (encl. 3) and the supplementary record of appeal (encl. 7) are different in that
H the supplementary record of appeal contains a brief grounds of sentencing which were added after the conclusion of the trial. I will reserve my comments on this at the end of this judgment.

[5] The notes of proceedings in both the record of appeal and the supplementary record of appeal on the relevant part at pp. 11 and 2
I respectively are reproduced as follows:

CT: Charge read and explained and made to understand in B.M.

Acc: Understand the charge in BM and Pleads Guilty.

CT: Nature and consequence read and explained to the Acc in B.M. A

Acc: Understand the consequences of pleading guilty and still maintained plea of guilt.

[6] From the above notes of proceedings, although the nature and consequences were read and explained to the appellants, it was not clearly stated and ascertained as to what were the exact "nature and consequences" of the guilty plea that were understood by the appellants. As pointed out by Mr Arthur Lee in his submission, the learned Magistrate only stated that the appellants had understood the consequences and not the nature of guilty plea. This omission runs foul of s. 173(b) of the CPC which requires the court to ascertain that the accused understands the nature and consequences of this plea and that he intends to admit the offence unequivocally before the accused's plea is recorded. B C

[7] On what should be the correct procedure adopted by the learned Magistrate and the Sessions Court Judge when accepting an accused's plea of guilty is best summed up by Yew Jen Kie J in *Chai Ai Ping v. PP* [2010] 1 LNS 92 (Criminal Appeal No. KCH-42-5-2009). It was held in that case, without explaining in clear terms of what exactly the nature and consequences of the guilty plea, one cannot assume that the court had informed the accused of his right to claim trial and the material facts stated in the charge. Neither can it be presumed that the appellant had been informed that since he had pleaded guilty to the charge, there would be no trial and that he would be convicted of the charge preferred against him and sentence to be meted out accordingly. D E

[8] I must further add that all the above must be properly recorded in the notes of proceedings to ensure that the requirements under s. 173(b) of the CPC are to be complied with. It is therefore insufficient for the learned Magistrate to record in the notes of the proceedings that the appellants understood the nature and consequences without further explaining that since they pleaded guilty, they are not entitled to claim trial and to call witnesses but to be convicted upon their own plea and to be sentenced accordingly based on their plea. F G

[9] In the circumstances, I find that the complaints posed by learned counsel for the appellants merit my consideration. In exercising my power of revision, I set aside the conviction and sentence and remit this case back to the Magistrate's Court for a retrial. I direct this case to be fixed for mention at 2.30pm today. H

[10] Coming back to the issue where the notes of proceedings before the Magistrate's court in the record of appeal and the supplementary record of appeal were differed, I wish to make some observations. For ease of comparison, I reproduce the relevant part of the notes of proceeding in the record of appeal and in the supplementary record of appeal as follows: I

Record of Appeal

CT: Upon hearing the mitigation and aggravating factors and upon considering the facts of this case, I hereby impose:

1st Accused - 10 months imprisonment from the date of arrest.

2nd Accused - 10 months imprisonment from the date of arrest.

03:12 PM - 27 November 2015.

Supplementary Record of Appeal:

Court: Satisfied with the plea. Conviction is to be recorded.

In passing the sentence, the Court has taken into account;

- Both the Accused's plea of guilty which have saved the court's time and costs;
- Both the Accused are 1st offender;
- Mitigation made;
- Facts of the case;
- The Court also in this case takes into account the public interest;
- The injury sustained by the complainant in this case;
- That the charge under Section 348 Penal Code is mandatory for custodial sentence.

I therefore hereby impose:

1st Accused - 10 months imprisonment from the date of arrest.

2nd Accused - 10 months imprisonment from the date of arrest.

This note is also used as Ground of Decision in the event of Appeal.

03:12 PM - 27 November 2015.

[11] The notes of proceedings in the record of appeal are the original notes taken by the learned Magistrate during the trial. However, the notes of proceedings in the supplementary record of appeal are the amended version to include the learned Magistrate's grounds of sentence in brief.

[12] I must say that the procedure adopted by the learned Magistrate is wrong. By adding the grounds of sentencing into the original notes of proceedings, after the filing of the appeal, the learned Magistrate is basically altering what had been recorded during the trial. This practice should stop immediately unless the alteration is necessary due to minor clerical and editorial mistakes. The original notes of proceedings should be kept intact to ensure that the trial is conducted in a fair and transparent manner.

[13] The proper procedure, in my view, is for the learned Magistrate to prepare the grounds of sentencing separately and to be supplied to the appellants or the learned Magistrate could have recorded his grounds of sentencing there and then when passing the sentence if the learned Magistrate so wishes.

[14] For the sake of completeness, on the appeal against sentence, I would not disturb the sentence passed by the learned Magistrate if I had not set aside the conviction. The sentence of ten months' imprisonment imposed by the learned Magistrate is clearly within the ambit of the law. In my view, it is not manifestly excessive taking into account that a person's right to move about freely was curtailed due to the wrongful confinement. While in the confinement, the complainant was also badly injured by the appellants.